

OGC REVIEW COMPLETED

SCHER v. WEEKS, 231 F.2d 494
(U.S.C.A. for D.C. decided January 19, 1956)

This is an action by a discharged employee of the Department of Commerce to have his removal declared illegal. No question of veterans' preference appears in the report.

Scher was discharged by the Secretary of Commerce under the authority of section 304 of the Department of Commerce Appropriation Act of 1953 (66 Stat. 549, 567). This statute was virtually identical with the authority of the DCI under the National Security Act and the Secretary of State under a provision of several State Department Appropriation Acts including the authority under which Secretary Acheson discharged John Stewart Service.

Scher sought a decree holding the statute unconstitutional, declaring his removal illegal in any event and requiring reinstatement. The constitutionality of the statute was upheld and the discharge declared legal since the Secretary complied with the terms of the statute. A footnote points out that Scher's discharge carries no implication that he may be either disloyal or a security risk.

SERVICE v. DULLES, 235 F. 2d 215
(U.S.C.A. for D.C. decided June 14, 1956)

This decision upheld the discharge of the employee under the authority of State Appropriation Act language virtually identical with the Director's authority and that of the Secretary of Commerce used in the Scher case. The defense raised different issues in this case because of previous reviews of charges against Service by the Loyalty Security Board of the Department of State and decisions that no reasonable doubt existed as to his loyalty to the U.S. Subsequently, the Loyalty Board of the Civil Service Commission held that there was reasonable doubt about Service's loyalty. The Supreme Court in *Peters v. Hobby*, 349 U.S. 341 (1955) held that the Civil Service Commission Board was limited to review of cases of persons recommended for dismissal by the Loyalty Boards of their departments. Therefore, the decision of the Civil Service Commission Board was a nullity and the defense claimed that Secretary Acheson's action in dismissing Service, admittedly on a determination based on the Civil Service Review Board's findings, was illegal. The District Court held and the Court of Appeals affirmed in this decision that regardless of the basis for Secretary Acheson's determination he had authority under the broad language of the Appropriation Act to discharge Mr. Service. The Court said that it could not review the correctness of the Secretary's determination and that its function was limited to determining whether proper procedural requirements of the statute had been followed. The only procedural requirement of the statute was a determination in the discretion of the Secretary that the termination was necessary and advisable in the interests of the U.S. That determination the Secretary made.

A footnote to the decision states that since the finding of the Review Board is a nullity and Service's discharge is sustained only under the broad discretion granted in the Appropriation Act that the quotation from note two in *Scher v. Weeks* would seem equally applicable in this case:

"It should be noted, however, that in the case at bar appellant's discharge carries no implication that he might be either disloyal or a security risk."

MYERS v. HOLLISTER, 226 F.2d 346
(U.S.C.A. for D.C., decided September 1, 1955)

This is an action by a veteran preference eligible in the classified competitive Civil Service employed by the Mutual Security Agency seeking to have his discharge set aside and to be restored to his position. In Section 7(f) of the Mutual Security Act of 1952, 22 U.S.C.A. 1655(d), it was required that the Director of Mutual Security reduce personnel in the agency by five per cent. The following proviso was included:

"Provided further, That after the Director [of Mutual Security] has determined the reduction to be effected in each agency, the determination as to which individual employees shall be retained shall be made by the head of the agency concerned."

Plaintiff's appeal to the Civil Service Commission was dismissed on the ground that under the MSA proviso his discharge was within the statutory authority of the Director. The District Court dismissed his complaint on the basis of the MSA proviso.

A court of appeals stated that to uphold the plaintiff's contention that the proviso was subject to the limitations in the Veterans' preference Act would deprive the language of the former statute of its essential meaning. The court then looked at the legislative history of the MSA which included the following:

"The head of each agency is thereafter to determine in his own discretion which employees he will retain as most capable of carrying out the program, without regard to existing statutes, regulations and procedures for reduction in force."

The court of appeals on the basis of the statutory language and the legislative history ruled that the proviso was intended to give broad discretionary power to discharge employees without regard to existing statutes, regulations and procedures for reduction in force. It concluded with the following language:

"We further conclude that in the matter of reductions in force in Federal agencies, contrary to what appellant argues, the Veterans' Preference Act occupies the position of a general law and the MSA proviso that of a special law, applying only to one particular reduction in force in one specified agency and not impairing or affecting in any way the rules applicable to reductions in force in other agencies or even in MSA beyond the five per cent reduction in force ordered by Congress in the Mutual Security Act of 1952. As such, the proviso must prevail. *MacEvoy Co. v. United States*, 1944, 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1163; *Shelton v. United States*, 1947, 83 U.S.App.D.C. 32, 165 F.2d 241.

(Judge PRETTYMAN, dissenting)

NATIONAL SECURITY ACT of 1947 (61 Stat. 495, 498)

SECTION 102(c). Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the DIRECTOR OF CENTRAL INTELLIGENCE may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the government if declared eligible for such employment by the United States Civil Service Commission.

DEPARTMENT OF STATE APPROPRIATION ACT, 1950 (63 Stat. 447, 456)

SECTION 104. Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

DEPARTMENT OF COMMERCE APPROPRIATION ACT, 1953 (66 Stat. 549, 567)

SECTION 304. Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of Commerce may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of Commerce whenever he shall deem such termination necessary or advisable in the best interests of the United States.

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00C/P-8121
DRAFT

SUBJECT: Opening Statement for

Employment Inquiry

1. Mr. , as you know, the Clandestine Services Career Service Board, which is your career service, has recommended your termination, pursuant to Section 102(c) of the National Security Act. Section 102(c) authorizes the DCI, in his discretion, to terminate the employment of any officer or employee of this Agency whenever he shall deem such termination necessary or advisable in the interests of the United States. The Director of Personnel, in order to take a position with respect to the recommendation to terminate and to take such actions and make such recommendations to the DD/S and the DCI as he may think proper, has appointed me to undertake an inquiry into all the relevant facts of your employment and the Career Service Board recommendation. I am to report my findings to the Director of Personnel, together with my recommendations.

2. At the outset, it should be understood that this is not an adversary proceeding in any way. It is not required by law, nor is the authority of the DCI under Section 102(c) contingent upon his undertaking such an inquiry. It is merely an administrative step on the part of the Director of Personnel to determine all the facts and to propose a course of action. There will not be testimony in the legal sense, nor will rules of evidence be followed. There will be no cross-examination either of you or of any other persons. Your discussions and comments will be confidential in the personnel, as well as the security, sense. You will not be present when other persons are queried, nor will others be present during my discussions with you. I shall notify you when I have completed my study and have submitted my report and recommendations to the Director of Personnel. My report, however, will go to him only. This inquiry, you will understand, is not the Special Employment Review Board referred to by in his letter of December 9, 1957, to you.

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3. It is my desire to develop all the facts here concerning your qualifications, your performance and record, security and medical aspects, and other pertinent points. To this end, I will examine your personnel file and will talk with your present and past supervisors and Agency associates. In particular, I will welcome your views and comments. It is my hope and intention to develop the picture in a fairly orderly fashion, but also to proceed as rapidly as possible. In order to proceed promptly, I would like today to ask you to recite the chronological order of your employment with CIA, including, insofar as your memory permits, the dates of initial employment and subsequent assignments, titles of each job and the nature of the duties, and the names of supervisors and all Agency associates whom you feel are or have been particularly in a position to have a first-hand knowledge or judgment of your performance.

Suggested Outline for _____

Employment Inquiry

I. Qualifications

A - Pre-CIA

1. PHS
2. Form 57
3. Comments by Subject
4. Other

B - CIA

1. Training Record
 - a. Title of Courses
 - b. Description of Courses
 - c. Evaluation of Performance
2. Comments by Subject

II. Performance and Record

- A - Statement by Subject - Exact dates, titles, description of duties
- B - Personnel Actions
- C - Fitness Reports, Commendations, Reprimands
- D - Statements of Superiors and Associates Re Performance
- E - Comments by Subject re Performance
- F - Other

III. Security

- A - Written or Oral Statement by Security**
- B - Comments by Subject**
- C - Other**

IV. Medical

- A - Written or Oral Statement by Medical**
- B - Comments by Subject**
- C - Other**

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PERSONNEL

1 July 1953

HEARING AND REVIEW PROCEDURES

FAIR EMPLOYMENT PROCEDURE

1. The Central Intelligence Agency reaffirms its adherence to the principles outlined in Executive Order No. 9980, "Regulations Governing Fair Employment Practices Within the Federal Establishment."

2. Officials of the Agency who have responsibility for supervising personnel should ensure that employees under their jurisdiction are aware of the provisions of CIA [redacted] "Fair Employment Procedure." Supervisory officials will also take the necessary steps to call this regulation to the attention of new employees.

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FOR THE DIRECTOR OF CENTRAL INTELLIGENCE:

L. K. WHITE
Acting Deputy Director
(Administration)

DISTRIBUTION: AB

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